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Supreme Court, U.S.
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No. 94-2042

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MICHAEL F. BLAKENEY,
Petitioner,

v.

BAKER HUGHES INCORPORATED,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a waiver or release of claims under the Age Discrimination in Employment Act, which allegedly does not meet the minimum statutory requirements of the Older Workers Benefit Protection Act, is ratified by retention of the consideration.

PARTIES TO THE PROCEEDING

Petitioner, appellant below, is Michael F. Blakeney ("Blakeney").

Respondent, appellee below, is Baker Hughes Incorporated ("Baker Hughes"). In accordance with Rule 29.1 of the Rules of this Court, Respondent states that it has no parent company. Respondent has many wholly owned subsidiaries. Respondent's subsidiaries which are not wholly owned, either directly or through other subsidiaries, are:

CKS Espanola S.A.
Drilling Fluids Services (Far East) Stn Bhd.
Malaysia Mud and Chemicals Sdn. Bhd.
Milpark Nigeria Ltd.
Baker Hughes INTEQ (M) Sdn. Bhd.
Lombard Baker Leasing Co.
Hughes Tool Company Chile Ltda.
Baker Hughes Mining Tools Peru, S.A.
Baker Oil Tools (Brunei) Sdn. Bhd.
Baker Oil Tools de France S.A.R.L.
Aquaness Quimica de Venezuela S.A.
Baker Quimica de Venezuela S.A.
Venezolana de Resinas, C.A.
P.T. Elnusa Chemlink
Gummiwerk Christensen–Netzsch GmbH
Reed Rock do Brazil Industrial Ltda.
Christensen–Netzsch Rubber, Inc.
ChuanShi Christesen Diamond Bit Company, Ltd.
EXLOG Arabian Gulf Limited
Mid–East Drill Bit Manufacturing Co. Ltd.

Abunayyan–Hughes Tool S.A. Ltd. Co.
Lufkin Argentina S.A.
Milpark Kuwait for Drilling Fluids Company
Milchem Libya Co., Ltd.
P.T. Milchem Indonesia
Teleco Oilfield Services Sdn. Bhd.
Eimco (Central Africa) (Pvt) Limited
Milafon Venezolana C.A.
Ferranti Eastman Survey GmbH
Societe Camerounaise de Broyage Minerai Petroliers
Baker Nigeria Ltd.
Proveedores Para Operaciones Energeticas S.A. de C.V.
Herramientas Interamericanas S.A. de C.V.
Baker Oil Treating (India) Private Ltd.
P.T. Eastman Christensen Indonesia
Baker Hughes Gabon S.A.
Baker Mira Saudi Arabia Limited

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RESPONDENT'S BRIEF IN OPPOSITION

COMES NOW Baker Hughes Incorporated, Respondent ("Baker Hughes") and respectfully represents:

STATEMENT OF THE CASE

The Older Workers Benefit Protection Act ("OWBPA") codifies, in the context of claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., the common law principle that any waiver or release of claims or causes of action must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). This case presents the question of whether the OWBPA also forecloses, with respect to claims under the ADEA, the common law principle that a voidable waiver or

release is ratified by retention of the consideration.

The Fifth Circuit in this case, and in two prior cases, correctly held that a release which does not satisfy the "knowing and voluntary" requirements of the OWBPA is voidable but not void and is ratified by retention of the severance benefits.

Petitioner, Michael F. Blakeney ("Blakeney") is a former employee of Baker Hughes. Blakeney was laid off by Baker Hughes on April 6, 1992 as part of a general reduction in force. In connection with the termination of his employment, he signed a written Settlement Agreement and General Release (the "Release") by which he released all claims and causes of action without limitation, including expressly rights arising out of the Federal Age Discrimination in Employment Act. A copy of the Settlement Agreement and General Release is Appendix A to this Brief. As consideration for the Release, he was paid severance benefits totalling in excess of $11,000.00. By the express terms of the Release, Michael F. Blakeney released the claims which are the basis of his complaint.

Blakeney signed the Release on April 7, 1992 and received the severance benefits within a week or two afterwards. Blakeney filed a complaint with the E.E.O.C. on November 2, 1992 alleging age discrimination. The E.E.O.C. ruled against Blakeney. Blakeney filed his Complaint with the District Court on August 25, 1993 alleging claims under the ADEA. Blakeney also asserted causes of action under Tex.Rev.Civ.Stat.Ann.Art. 5221K and for the tort of intentional infliction of emotional distress.

Blakeney was deposed on February 23, 1994. As of that date, Blakeney had not tendered any of the severance benefits

back to Baker Hughes and had no intention to do so. On May 19, 1994, Blakeney tendered the severance benefits to Baker Hughes. Baker Hughes refused the tender and returned the check to Mr. Blakeney's attorney on May 25, 1994.

Blakeney moved for partial summary judgment contending that the Release was ineffective as a matter of law for failure to comply with three provisions of 29 U.S.C. § 626(f)(1), specifically clauses (A), (C) and (E). Blakeney's challenge to the Release was solely a question of law concerning the language of the Release. Blakeney presented no evidence concerning any events or circumstances concerning the execution of the Release or any actions of Baker Hughes which induced the signing of the Release. No attempt was made to show that the Release was procured by fraud, duress or undue influence. Blakeney's depositions showed that, in fact, there was no fraud, duress or undue influence. Blakeney relied solely upon his contention that the language of the Release does not comply with the requirements of 29 U.S.C. § 626(f)(1).

Baker Hughes then moved for summary judgment on the ground that the Release was knowing and voluntary and complied with 29 U.S.C. § 626(f)(1). Baker Hughes further contended that if, for any reason, the Release did not comply with 29 U.S.C. § 626(f)(1), then the Release was voidable, only, not void, and that by receiving and retaining the severance benefits, Blakeney ratified the Release. Blakeney's attempts to revoke the Release and tender back the severance benefits, more than two years after the Release was signed and the severance benefits were paid, was not timely. The attempt to rescind the Release was ineffective because ratification of a voidable contract having once been made cannot thereafter be revoked and the Release, having been ratified, cannot be recalled.

The District Court concluded that Blakeney ratified the Release by retaining the severance benefits, and that his attempt to revoke the Release by tendering back the severance benefits more than two years after the date of the Release was too late. Summary Judgment was granted to Baker Hughes. In an unpublished memorandum, the District Court based its ruling on *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995) which held that a release of ADEA claims which did not comply with the requirements of the OWBPA was voidable but not void and was ratified by retention of the severance benefits, and upon *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) which held that an attempt to tender back severance benefits more than two years after the release was signed and the benefits were paid simply came too late to avoid ratification.

Blakeney appealed from the summary judgment on his claims under the ADEA and Tex.Rev.Civ.Stat.Ann.Art. 5221K. The Court of Appeals affirmed the District Court's ruling on March 6, 1995 without a written published opinion. *Blakeney v. Baker Hughes Incorporated*, 50 F.3d 1032 (5th Cir. 1995).

REASONS FOR DENYING THE WRIT

1. THE OWBPA DOES NOT FORECLOSE APPLICATION OF THE PRINCIPLE OF RATIFICATION TO A RELEASE OF CLAIMS UNDER THE ADEA

Blakeney errs in contending that the OWBPA forecloses application of the common law doctrine of ratification to a release of claims under the ADEA. The OWBPA merely codified under the ADEA the common law principle that a waiver or release must be "knowing and voluntary."

It is a general principle of contract law that a release can be rescinded only upon a tender of any consideration received. Samuel Williston, 12 *Williston on Contracts* § 1460 (Walter H.E. Jaeger Ed., 3d Ed. 1970). The doctrine of contractual ratification is the enforcement of a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise. RESTATEMENT (SECOND) OF CONTRACTS § 85 (1981). To have ratification, there must be an antecedent contract that was previously voidable, but not avoided. A contract is voidable if there exist grounds upon which a party can avoid, or disaffirm, his duty of performance. Such grounds have traditionally included fraud, duress, mistake and infancy. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981). Ratification operates to allow a party having the power to avoid his contractual duty to make, or be deemed to have made, a new promise to perform his previously voidable duty and thus, extinguish his power of avoidance. RESTATEMENT (SECOND) OF CONTRACTS § 85 cmt. a. (1981). Blakeney does not dispute that his suit is barred by the Release if the traditional common law doctrine of ratification is applicable.

Blakeney contends that the Fifth Circuit Court of Appeals holding in this case and in the cases of *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), rehearing en Banc denied, 37 F.3d 634, cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995), and *Wittorf v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994) is wrong and should be reversed. These cases all stand for the proposition that a release of ADEA claims which does not meet the "knowing and voluntary" requirements of the OWBPA is voidable, but not void, and is ratified by retention of the consideration. Blakeney relies upon the Seventh Circuit in the case of *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), cert denied, 114 S.Ct. 2104, 128 L.Ed.2nd 665 (1994), and the

Eleventh Circuit in the case of *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), cert. denied, 113 S.Ct. 412, 121 L.Ed.2d 336 (1992) and takes the position that a release which fails to comply with the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(1) ("OWBPA") is void, not merely voidable, and cannot be ratified. *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534, 541 (5th Cir. 1993) cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995), expressly rejected the reasoning of *Forbus* and *Oberg*.

Nothing in the Text or Legislative History of the OWBPA Discloses a Congressional Intent to Disturb the Common Law Principle of Ratification.

Before the adoption of the OWBPA, there was a requirement under federal common law that a release of ADEA claims be "knowing and voluntary." The "knowing and voluntary" requirement which existed before the enactment of the OWBPA included the same elements: (1) the employee's education and business experience, (2) the amount of time the employee had possession of or access to the agreement before signing it, (3) the role of the employee in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, and (6) whether the consideration paid given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law. *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990); *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399 (2nd Cir. 1989), cert denied, 493 U.S. 924, 110 S.Ct. 292, 107 L.Ed.2d 272 (1989). Under this common law standard, a release which was not "knowing and voluntary" was voidable, but not void, and was ratified by retention of the severance benefits. *O'Shea v. Commercial Credit*, 930 F.2d 358 (4th Cir. 1991), cert. denied,

502 U.S. 859, 112 S.Ct. 177, 116 L.Ed.2d 139; *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). The enactment of the OWBPA simply codified a statutory definition of "knowing and voluntary."

The traditional common law basis for voidable contracts, fraud, duress, coercion or mistake of fact, are similar to those circumstances against which Congress sought to protect older workers. A contrary interpretation would be inconsistent with one of the goals of the ADEA, "To help employers and workers find ways of meeting problems arising from the impact of age on employment." *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995), quoting 29 U.S.C. § 621(b). Ratification permits private resolution of ADEA disputes without the cost associated with litigation.

Nothing in the text of the OWBPA evidences a congressional intent to disturb the common law principle of ratification. The language of the OWBPA is plain. The statute says that a waiver which fails to satisfy the requirements of 29 U.S.C. § 626(f)(1) subsections (A) through (H) is not "knowing and voluntary." The statute does not say that a waiver which fails to satisfy the requirements of 29 U.S.C. § 626(f)(1) subsections (A) through (H) is void of legal effect. The plain meaning of 29 U.S.C. § 626(f)(1) is that such waivers are not "knowing and voluntary" and thus subject to being avoided at the election of the employee. *Wamsley*, 11 F.3d at 539.

Prior to the enactment of 29 U.S.C. § 626(f)(1), the law was clear that even if a release executed by an employee was invalid to release age discrimination claims, the employee subsequently ratified the agreement by accepting all severance pay and other continuing benefits of the termination package. *O'Shea v. Commercial Credit*, 930 F.2d 358 (4th Cir. 1991),

cert. denied, 502 U.S. 859, 112 S.Ct. 177, 116 L.Ed.2d 139; *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). If Congress had intended to reverse the holding of these cases in the OWBPA, it would have done so expressly.

Nothing in the legislative history of the OWBPA evidences a congressional intent to disturb the common law principle of ratification. The legislative history of the OWBPA indicates that the fundamental purpose of the waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion, or mistake of material facts. S.Rep.No. 101–263, 101st Cong., 2nd Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1537. The circumstances against which these provisions were designed to protect are the same circumstances that have traditionally given rise to grounds upon which a party can avoid contractual obligations. *Wamsley*, 11 F.3d at 539.

The provisions of § 626(f)(1) support this conclusion. Subsection (G) of § 636(f)(1) provides that for seven days after execution of a waiver, an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day period. If non–compliance with the other subparts of § 626(f)(1) rendered the agreement void, there would be no need for subpart (G). *Wamsley*, 11 F.3d at 539.

An interpretation of § 626(f)(1) that renders defective waiver agreements void would be inconsistent with one of the expressed purposes of the ADEA: "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment disputes without litigation. If employers were forced to assume

the risk that non-compliance with the technical requirements of § 626(f)(1) renders a waiver agreement void and not capable of being ratified, employers would be disinclined to propose such waivers or pay severance benefits conditioned upon such waivers. *Wamsley*, 11 F.3d at 539.

The holding of *Wamsley* and *Wittorf* also conforms with ordinary rules of statutory construction. Under American law, there are exceptions to the general rule that an agreement which violates a provision of a statute, or which cannot be performed without violating a statute, is illegal and void. A distinction may be made "between statutes 'which forbid certain contracts to be made or certain acts to be done' and 'those which prescribe a certain mode and manner of doing the act, or the procedure to be followed in making the contract,' the inference being that a violation of a statute of the latter kind does not necessarily render a contract void." 55 A.L.R.2d 481, at 491, quoting *Commercial Credit Co. v. Schreyer*, 120 Ohio St. 568, 166 N.E. 808, 63 A.L.R. 674 (1929) at 166 N.E. p. 678; *United States v. Continental Fwdg. Company*, 311 F.Supp. 956 (U.S. Customs Court 1970), affirmed 463 F.2d 1129. 29 U.S.C. § 626(f)(1) clearly falls within the latter category. 29 U.S.C. § 626(f)(1) does not make a release of claims under the ADEA illegal. It simply prescribes the manner in which a claim under the ADEA may be released and the procedure to be followed in making the contract.

Concluding that a release which does not comply with the OWBPA is voidable but not void does not render the requirements of the OWBPA for executing a knowing and voluntary release meaningless. The Fifth Circuit stated in a footnote to the opinion in *Wamsley*:

> Note that the court is not enforcing the promises contained in any of the allegedly

> voidable waiver agreements as such. What the court is enforcing is a new promise, evidenced by subsequent conduct, to be bound by the terms of the original waiver agreements. Therefore, that the original waiver agreements may not have been in compliance with § 626 is of no consequence. The court is now concerned with the enforcement of a new promise which gives rise to a new legal obligation. As a new promise that creates a new obligation, it is not subject to the waiver requirements of § 626, and thus, such requirements pose no bar to its enforcement.

Wamsley v. Champlin Refining and Chemicals, Inc., 11 F.3d 534, 541 n. 11 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995).

The plain meaning of OWBPA is that a release which does not conform to the statutory requirements is not "knowing and voluntary" and may be avoided by the employee, at his option.

Applying the Common Law Principle of Ratification to a Release of Claims Under the ADEA Does Not Conflict With this Court's Opinion in Hogue v. Southern R. Co.

Hogue v. Southern R. Co., 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968) (per curiam) does not apply to the ADEA. *Hogue* interpreted the FELA, which protects injured railroad workers. The policies of the FELA and the ADEA are different. The pertinent provision of the FELA is 45 U.S.C. § 55, which states:

> Any contract, rule, regulation or device, whatsoever, the purpose or intent of which shall

> be to enable any common carrier to exempt itself from any liability created by the Act, shall to that extent be void....

The breadth of this statute was recognized in *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942). In that case, an injured employee had been paid an advance for living expenses pending a determination of the extent of his injuries and in consideration had agreed to sue only after an effort to settle in good faith had been made and failed and the advance had been returned. He nevertheless brought suit under the FELA without making restitution. It was held that his failure was no defense to the suit since the contract was void.

The purpose of the FELA is to promote liberal recovery for railroad workers who are injured in the course of employment. An injured railroad worker often has no other source of livelihood than his labor and is often in a disadvantaged bargaining position. However, the ADEA protects a different class of employees, many of whom are "highly paid and capable of securing legal assistance without difficulty." *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1043 (6th Cir. 1986) cert. denied 479 U.S. 850, 107 S.Ct. 178, 93 L.Ed.2d 114 (1986); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990).

The analogy to the FELA is not sound. The FELA concerns injured railroad workers. The Congressional purpose expressed in the FELA was to provide liberal recovery for injured workers. The injured workers' cause of action under the FELA is the common law cause of action for negligence. The FELA stripped the employer of common law defenses. On the other hand, the purpose of the ADEA, as expressed in the statute, is to promote employment of older persons based on their ability. The ADEA creates a wholly new right of

recovery which did not exist in common law. There is no expression of Congressional intent under the ADEA to promote liberal recovery for older workers. The analogy to the FELA is not sound. The rule of *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968) (per curiam) under the FELA does not apply to the ADEA.

Applying the Common Law Principle of Ratification to Releases of Claims Under the ADEA Serves the Public Policy of Settlement of Claims Without Litigation

Public policy favors voluntary settlement of claims and enforcement of releases. *Rogers v. General Elect. Co.*, 781 F.2d 452, 454 (5th Cir. 1986); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994), cert. denied, 115 S.Ct. 582, 130 L.Ed.2d 497 (1994). The rule that retention of the severance benefits ratifies the release serves a valid public purpose, namely encouraging the settlement of ADEA claims without litigation. The simplest and easiest way to fulfill this purpose is to give effect to the private agreements of the parties. *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993) cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995).

The facts of *Wamsley* illustrate why the contrary rule would defeat this purpose. In *Wamsley*, no challenge was made to the language of the release and both sides agreed that the release was in letter perfect compliance with 29 U.S.C. § 626(f)(1). Wamsley and the other plaintiffs alleged that they were told by employees of Champlin that they had to sign and return the release by their termination date, less than forty five days after receiving the notice. The nature of their attack on the releases insured that they would have a fact issue which would preclude a summary judgment, but for the doctrine of ratification. *Wamsley*, 11 F.3d at note 9, p. 539. But for the

doctrine of ratification, employees who sign releases which perfectly comply with 29 U.S.C. § 626(f)(1) could obtain a trial on the merits to determine the validity of the release while retaining the severance benefits.

Furthermore, employers would have no confidence that they could rely on written releases of ADEA claims and would be less inclined to pay severance benefits. As the Seventh Circuit pointed out,

> Not even plaintiffs are helped in the long run by a rule allowing them to have their cake and eat it, for a defendant will not pay as much for a release that the plaintiff can challenge without having to repay the money as the price of maintaining the challenge.

Fleming v. U.S. Postal Service AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994), cert. denied, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995).

2. ERROR, IF ANY, WAS HARMLESS BECAUSE THE RELEASE FULLY COMPLIES WITH THE OWBPA

The Release which Blakeney signed fully satisfies all of the requirements of 28 U.S.C. § 626(f)(1) clauses (A) through (H) and is not defective in any particular.

Clause (A) of § 626(f)(1) requires that the agreement be written in a manner calculated to be understood by such individual, or by the average individual eligible to participate. The Release is entitled "Settlement Agreement and General Release" and contains a very broad description of claims released. It could not be understood to be anything other than

a general release.

Blakeney argued that the Release does not meet this requirement because, there is an ambiguity between the language of the Third and Eighth paragraphs as to whether the Release applies to claims arising in the future. The District Court correctly concluded that the Release was not ambiguous and that the specific language of the eighth paragraph controlled over the more general language of the third paragraph. The language of the Third paragraph is intended to define and describe the claims released in the broadest possible fashion. The Eighth paragraph plainly states "Notwithstanding any of the above, Employee is not waiving any rights to claims that may arise after the date of the execution of this Agreement." The words "Notwithstanding any of the above..." expressly supersede and overrule any contrary intent contained in the Third paragraph. Under the ordinary rules for the construction of contracts, the Eighth paragraph controls over anything to the contrary in the Third paragraph. The Release is susceptible of only one interpretation and is not ambiguous and expressly does not apply to future claims. The Release could not be understood to be anything other than a general release.

Blakeney's deposition testimony was that he did not understand the Release simply because he glanced over it but did not read it fully before he signed it, notwithstanding that he had the opportunity to do so. Blakeney's testimony did not show that he was, in fact, confused by the Release or did not understand it to be a general release. A party who signs a written instrument is presumed to know its contents, and he cannot avoid the obligations which may be imposed on him by that instrument merely upon a showing that he had not read it, or that he had not had it read and explained to him, or that he did not understand its provisions. *Hicks v. Ocean Drilling and*

Exploration Company, 512 S.W.2d 817, 825 (5th Cir. 1975) cert. denied, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 639 (1976).

The Release is entitled "Settlement Agreement and General Release" and contains a very broad description of claims released. It could not be understood to be anything other than a general release.

Clause (B) of § 626(f)(1) requires that the waiver specifically refer to rights or claims arising under the ADEA. The Third paragraph of the Release expressly does so.

Clause (C) of § 626(f)(1) requires that the waiver not waive rights or claims that may arise after the date the waiver is executed. The Eighth paragraph of the Release expressly provides:

> EIGHTH: Notwithstanding any of the above, Employee is not waiving any rights or claims that may arise after the date of the execution of this Agreement by Employee.

Clause (D) of § 626(f)(1) requires that the waiver be given only in exchange for consideration in addition to anything of value to which the individual already is entitled. Blakeney was paid severance benefits of $11,000 that he was not otherwise entitled to, which constitutes sufficient consideration for the Release. *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990).

Clause (E) of § 626(f)(1) requires that the individual be advised in writing to consult with an attorney prior to executing the waiver. This is found in the Second paragraph of the Release which states:

> SECOND: The Employee represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement and that he is voluntarily entering into this Agreement.

Blakeney argues that the statute requires that Blakeney be "advised" to consult with his private attorney, whereas in the Release Blakeney "...represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right,..." This is no more than a quibble. Clause (E) of 29 U.S.C. § 626(f)(1) does not require magic words which must be recited verbatim. "Understanding his right" to consult with his attorney is equivalent to being "advised" to consult with his attorney. The plain meaning of these words is a representation by Blakeney that he has been advised to consult with his private attorney. Blakeney has cited no authority to support his contention that the chosen language is ineffective or invalidates the Release.

Clause (F) of § 626(f)(1) requires that the individual be given a period of at least 21 days within which to consider the agreement. The final paragraph of the Release states in bold:

> YOU SHOULD TAKE AT LEAST TWENTY-ONE (21) DAYS FROM RECEIPT OF THIS AGREEMENT TO CONSIDER ITS TERMS BEFORE SIGNING IT."

Blakeney was not told that he had to sign the Release by any particular date and was not pressured to sign the Release

without waiting the twenty–one day period by anything other than the fact that he wanted the money.

Clause (G) of § 626(f)(1) requires that the agreement provide that for a period of at least 7 days following the execution of the agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired. The Eighth paragraph of the Release expressly provides:

> Moreover, for seven (7) days following the execution of the Agreement, Employee may revoke the Agreement, and the Agreement shall not become effective or enforceable until this seven (7) day revocation period has expired.

Clause (H) of 29 U.S.C. § 626(f)(1) concerns exit incentive programs and is not applicable to this case. No exit incentive was offered to Mike Blakeney.

The Release fully complies with all the requirements of 28 U.S.C. § 626(f)(1) and is not defective in any particular.

3. THE ALLEGED CIRCUIT CONFLICT IS NOT APPROPRIATE FOR REVIEW AT THIS TIME

Blakeney argues that this Court should grant certiorari to resolve an alleged split between the Fifth Circuit decisions in *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), rehearing en Banc denied, 37 F.3d 634, cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995), and *Wittorf v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994) and the Seventh Circuit decision in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), cert denied, 114 S.Ct. 2104, 128

L.Ed.2nd 665 (1994). In *Oberg*, the Seventh Circuit held that an ADEA plaintiff need not tender back the severance benefits paid to him for an allegedly invalid release in order to proceed with a lawsuit under the ADEA. This Court declined to accept certiorari in both *Wamsley* and *Oberg*.

Ordinarily, this Court does not seek to resolve a split of authority until several of the Circuit Courts of Appeals have addressed the question at issue. This Court has followed the salutary policy of allowing conflicts in the circuits to go unaddressed until more than two courts of appeal have considered a question. This allows a period of exploratory consideration and experimentation by lower courts before this Court ends the process with a nationally binding rule. *McCray v. New York*, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (J. Stephens dissenting); *United States v. Mendoza*, 464 U.S. 154, 160, 104 S.Ct. 568, 78 L.Ed.2d. 379 (1984).

Cases are presently pending before the Fourth and Sixth Circuits involving the issue of whether a release of ADEA claims is ratified by retention of severance benefits. These are *Blistien v. St. John's College*, No. 94-2223 (4th Cir.) and *Raczak v. Ameritech Corp.*, No. 93-CV-72697-DT (6th Cir.).

Furthermore, the Seventh Circuit in a recent case has indicated a possible retreat from the position taken in *Oberg*. In *Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), cert. denied, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995), a different panel of the Seventh Circuit noted that the opinion in *Oberg* was strongly criticized in *Wamsley*. The court stated, with respect to *Forbus* and *Oberg*, "The idea behind these cases...is a little obscure to us." *Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), cert. denied, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995). There is a question as to whether *Oberg* will survive within its own

circuit.

No opinions on the issue have been handed down by any court since certiorari was denied in *Wamsley* in May of this year. The reasons for denying certiorari in *Wamsley* are equally applicable to this case.

Blakeney has offered no reason why this Court should not wait for the benefit of decisions by other Circuit Courts of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1995

Counsel for Respondent

APPENDIX

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (the "Agreement") is made and entered into by and between Michael Blakeney hereinafter referred to as "Employee") and BAKER HUGHES INCORPORATED and its subsidiaries and affiliates (hereinafter referred to as the "Company").

W I T N E S S E T H:

WHEREAS, the Employee's active service with the Company has or will terminate; and

WHEREAS, the Company has offered certain benefits to the Employee under the provisions of the Company's Severance Policy (the "Policy") and the attendant Letter of Explanation (the "Letter") as consideration to the Employee to enter into this Agreement.

WHEREAS, the Employee and the Company desire to settle fully and finally all differences between them, including, but in no way limited to, any differences that might arise out of Employee's employment with the Company and the termination thereof;

NOW, THEREFORE, in consideration of the premises and mutual promises herein contained and in conjunction with the Policy and the Letter, it is agreed as follows:

FIRST: This Agreement shall not in any way be construed as an admission by the Company that it has acted wrongfully with respect to the Employee or any other person, or that the Employee has any rights whatsoever against the

Company, and the Company specifically disclaims any liability to or wrongful acts against the Employee or any other person, on the part of itself, its employee or its agents.

SECOND: The Employee represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement and that he is voluntarily entering into this Agreement.

THIRD: As a material inducement to the Company to enter into this Agreement, the Employee hereby irrevocably and unconditionally releases, acquits and forever discharges the Company and each of the Company's owners, stockholders, predecessors, successors, assigns, agents, directors, officers, employees, representatives, and attorneys of such divisions, subsidiaries, affiliates (and agents, directors, officers, employees, representatives and attorneys of such divisions, and subsidiaries and affiliates), and all persons acting by, through, under or in concert with any of them (collectively "Releasees"), or any of them, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever, known or unknown, suspected or unsuspected, including, but not limited to, rights arising out of alleged violations of any contracts, express or implied, any covenant of good faith and fail dealing, express or implied, or any tort, or any legal restrictions on the Company's right to terminate employees, or any federal, state or other governmental statute, regulation, or ordinance, including, without limitation, Title VII of the Civil Rights Act of 1964 and the Federal Age Discrimination in Employment

Act, which the Employee now has, owns or holds, or claims to have, own or hold, or which the Employee at any time heretofore, had, owned or held, or claimed to have, own or hold, or which Employee at any time hereinafter may have, own or hold, or claim to have, own or hold against each or any of the Releasees. In addition, the Employee waives all rights and benefits afforded by any state laws which provide in substance that a general release does not extend to claims which a person does not know or suspect to exist in his favor at the time of executing the release which, if known by him, must have materially affected his settlement with the other person. The only exception to the foregoing shall be claims for wages and benefits specifically promised under the Policy and the Letter.

FOURTH: The Employee represents and acknowledges that in executing this Agreement he does not rely and has not relied upon any representation or statement, oral or written, not set forth herein made by any of the Releasees or by any of the Releasees' agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

FIFTH: This Agreement, the Policy and the Letter sets forth the entire agreement between the parties hereto, and fully supersedes any and all prior agreements or understandings, oral or written, between the parties hereto pertaining to the subject matter hereof.

SIXTH: This Agreement, the Policy and the Letter shall be construed and interpreted in accordance with the laws of the State of Texas with venue for litigation being in Houston, Texas.

SEVENTH: The invalidity or unenforceability of a term

of provision(s) of this Agreement shall not affect the validity or enforceability of any other term or provision of this Agreement, which shall remain in full force and effect.

EIGHTH: Notwithstanding any of the above, Employee is not waiving any rights or claims that may arise after the date of the execution of this Agreement by Employee. Moreover, for seven (7) days following the execution of the Agreement, Employee may revoke the Agreement, and the Agreement shall not become effective or enforceable until this seven (7) day revocation period has expired.

PLEASE READ CAREFULLY, THIS AGREEMENT INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS. YOU SHOULD TAKE AT LEAST TWENTY-ONE (21) DAYS FROM RECEIPT OF THIS AGREEMENT TO CONSIDER ITS TERMS BEFORE SIGNING IT.

EXECUTED AT Houston (city), Texas (state), this 7 day of APRIL, 1992.

/S/ Michael Blakeney
Name

Michael Blakeney
Name Printed

EXECUTED at Houston (city), Texas (state), this 8th day of April 1992.

BAKER HUGHES INCORPORATED

/S/ M. R. Walker
By

Michael R. Walker
Name Printed